

FILED

08 FEB 22 PM 4:16

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

PA

DEPUTY

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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND BERRY,

Plaintiff,

vs.

TIMBERLINE MOULDING; MARVIN WAIT,
SUSAN WAIT and DOES 1 THROUGH 10,
Inclusive,

Defendants.

Case No. **08 CV 0352 BEN CAB**

CIVIL COMPLAINT

DEMAND FOR JURY TRIAL
[F.R.C.P. §38(b);
Local Rule 38.1]

Plaintiff, RAYMOND BERRY (hereinafter referred to as
"Plaintiff"), file this cause of action against Defendants
TIMBERLINE MOULDING, MARVIN WAIT, SUSAN WAIT and DOES 1 THROUGH
10, Inclusive, and would show unto the Court the following:

I.

JURISDICTION AND VENUE

1. This Court has original jurisdiction of this civil
action pursuant to 28 USC §1331, 28 USC §§1343(a)(3) and
1343(a)(4) for claims arising under the Americans with
Disabilities Act of 1990, 42 USC §12101 et seq. and the Court's
supplemental jurisdiction, 28 USC §1367.

2. Venue in this Court is proper pursuant to 28 USC

cf

1 §§1391(b) and (c).

2 3. Pursuant to 28 USC §1367(a), Plaintiff shall assert
3 all causes of action based on state law, as plead in this
4 complaint, under the supplemental jurisdiction of the federal
5 court. All the causes of action based on federal law and those
6 based on state law, as herein stated, arose from a common nuclei
7 of operative fact. That is, Plaintiff was denied equal access
8 to Defendants' facilities, goods, and/or services in violation
9 of both federal and state laws and/or was injured due to
10 violations of federal and state access laws. The state actions
11 of Plaintiff are so related to the federal actions that they
12 form part of the same case or controversy. The actions would
13 ordinarily be expected to be tried in one judicial proceeding.

14 II.

15 THE PARTIES

16 4. Defendant TIMBERLINE MOULDING is, and at all times
17 mentioned herein was, a business or corporation or franchise
18 organized and existing and/or doing business under the laws of
19 the State of California. TIMBERLINE MOULDING is located at 1315
20 Armormite, San Marcos, CA (hereinafter "the subject property".)
21 Plaintiff is informed and believes and thereon alleges that
22 Defendant TIMBERLINE MOULDING is, and at all times mentioned
23 herein was, the owner, lessor or lessee of the subject property
24 and/or the owner and/or operator of the public accommodation
25 located at the subject property.

26 5. Defendant MARVIN WAIT is, and at all times mentioned
27 herein was, an individual residing in and/or doing business under
28 the laws of the State of California. Plaintiff is informed and

1 believes and thereon alleges that Defendant MARVIN WAIT is, and
2 at all times mentioned herein was, the owner, lessor or lessee of
3 the subject property.

4 6. Defendant SUSAN WAIT is, and at all times mentioned
5 herein was, an individual residing in and/or doing business under
6 the laws of the State of California. Plaintiff is informed and
7 believes and thereon alleges that Defendant SUSAN WAIT is, and at
8 all times mentioned herein was, the owner, lessor or lessee of
9 the subject property.

10 7. Plaintiff is informed and believes, and thereon
11 alleges, that Defendants and each of them herein were, at all
12 times relevant to the action, the owners, franchisees, lessees,
13 general partners, limited partners, agents, employees,
14 employers, representing partners, subsidiaries, parent
15 companies, joint venturers and/or divisions of the remaining
16 Defendants and were acting within the course and scope of that
17 relationship. Plaintiff is further informed and believes, and
18 thereon alleges, that each of the Defendants herein gave
19 consent to, ratified, and/or authorized the acts alleged herein
20 of each of the remaining Defendants.

21 8. Plaintiff is an otherwise qualified disabled
22 individual as provided in the Americans with Disabilities Act
23 of 1990, 42 USC §12102, Part 5.5 of the California Health &
24 Safety Code and the California Unruh Civil Rights Act, §§51, et
25 seq., 52, et seq., the California Disabled Persons Act, §§54,
26 et seq., and other statutory measures which refer to the
27 protection of the rights of "physically disabled persons."
28 Plaintiff visited the public accommodation owned and/or

1 operated by Defendants and/or located at the subject property
2 for the purpose of availing himself of the goods, services,
3 facilities, privileges, advantages, or accommodations operated
4 and/or owned by Defendants and/or located on the subject
5 property.

6 9. Plaintiff is informed and believes and thereon alleges
7 that the subject facility has been newly constructed and/or
8 underwent remodeling, repairs, or alterations since 1971, and
9 that Defendants have failed to comply with California access
10 standards which applied at the time of each such new
11 construction and/or alteration.

12 **III.**

13 **FACTS**

14 10. Plaintiff has a mobility impairment and uses a
15 wheelchair. Moreover, he has had a history of or has been
16 classified as having a physical impairment, as required by 42
17 USC §12102(2)(A).

18 11. On or about October 2, 2007 and continuing through the
19 present date, Plaintiff was denied full and equal access to the
20 facilities owned and/or operated by the Defendants because the
21 facility and/or subject property were inaccessible to members
22 of the disabled community who use wheelchairs for mobility.
23 Plaintiff was denied full and equal access to portions of the
24 property because of barriers which included, but are not
25 limited to, inaccessible cashier counter, inaccessible restroom
26 facilities and lack of accessible parking space(s), as well as
27 lack of signage for such spaces. Plaintiff was also denied
28 full and equal access because of discriminatory policies and

1 practices regarding accommodating people with disabilities.
2 Plaintiff filed this lawsuit to compel compliance with access
3 laws and regulations.

4 12. As a result of Defendants' failure to remove
5 architectural barriers, Plaintiff suffered injuries. People
6 with disabilities, because of the existing barriers, are denied
7 full and equal access to the Defendants' facilities. The ADA
8 has been in effect for more than 16 years. Given the vast
9 availability of information about ADA obligations, including
10 FREE documents which are available from the U.S. Department of
11 Justice by calling (800) 514-0301 or at the following web
12 sites: www.sba.gov/ada/smbusgd.pdf, www.ada.gov/taxpack.pdf and
13 www.usdoj.gov/crt/ada, the failure of Defendants to comply with
14 their barrier removal obligations is contemptible.

15 13. Plaintiff is an otherwise qualified individual as
16 provided in the Americans with Disabilities Act or 1990, 42 USC
17 §12102, the Rehabilitation Act of 1973, Section 504 (as amended
18 29 USC §794) and the California Unruh Civil Rights Act, Civil
19 Code §§51, 52, 54.1, and 54.3, and other statutory measures
20 which refer to the protection of the rights of "physically
21 disabled persons." Plaintiff visited the public facilities
22 owned and operated by Defendants for the purpose of availing
23 himself of the goods and services offered and provided by
24 Defendants and/or for the purpose of obtaining removal of
25 architectural barriers and/or modification of policies,
26 practices and procedures to provide accessibility to people
27 with disabilities. Plaintiff was injured in fact, as set forth
28 more specifically herein.

1 14. Plaintiff alleges that Defendants will continue to
2 operate public accommodations which are inaccessible to him and
3 to other individuals with disabilities. Pursuant to 42 USC
4 §12188(a), Defendants are required to remove architectural
5 barriers to their existing facilities.

6 15. Plaintiff has no adequate remedy at law for the
7 injuries currently being suffered in that money damages will
8 not adequately compensate Plaintiff for the amount of harm
9 suffered as a result of exclusion from participation in the
10 economic and social life of this state.

11 16. Plaintiff believes that architectural barriers
12 precluding Plaintiff full and equal access of the public
13 accommodation will continue to exist at Plaintiff's future
14 visits, which will result in future discrimination of
15 Plaintiff, in violation of the Americans with Disabilities Act.
16 Plaintiff is currently being subjected to discrimination
17 because Plaintiff cannot make use of and obtain full and equal
18 access to the facilities, goods and/or services offered by
19 Defendants to the general public. Plaintiff seeks damages for
20 each offense relating to each of Plaintiff's visits to the
21 subject property when Plaintiff was denied full and equal
22 access to the subject property or was deterred from attempting
23 to avail himself of the benefits, goods, services, privileges
24 and advantages of the place of public accommodation at the
25 subject property because of continuing barriers to full and
26 equal access.

27 ///

28 ///

1 IV.

2 FIRST CLAIM FOR
3 VIOLATION OF AMERICAN WITH DISABILITIES ACT
4 42 USC §12101, et seq.

5 17. Plaintiff re-alleges and incorporates by reference
6 each and every allegation contained in paragraphs 1 through 16,
7 inclusive, as though set forth fully herein.

8 18. Plaintiff was denied full and equal access to
9 Defendants' goods, services, facilities, privileges,
10 advantages, or accommodations within a public accommodation
11 owned, leased and/or operated by Defendants, in violation of 42
12 USC §12182(a). Plaintiff was, therefore, subjected to
13 discrimination and is entitled to injunctive relief pursuant to
14 42 USC §12188 as a result of the actions or inaction of
15 Defendants.

16 19. Among other remedies, Plaintiff seeks an injunctive
17 order requiring compliance with state and federal access laws
18 for all access violations which exist at the property,
19 requiring removal of architectural barriers and other relief as
20 the court may deem proper. Plaintiff also seeks any other
21 order that will redress the discrimination to which he has been
22 subjected, is being subjected and/or will be subjected.

23 V.

24 SECOND CLAIM FOR
25 VIOLATION OF CALIFORNIA CIVIL CODE

26 20. Plaintiff re-alleges and incorporates by reference
27 each and every allegation contained in paragraphs 1 through 19,
28 inclusive, as though set forth fully herein.

21. Based on the facts plead hereinabove and elsewhere in

1 this complaint, Defendants did, and continue to, discriminate
2 against Plaintiff and persons similarly situated by denying
3 disabled persons full and equal access to and enjoyment of the
4 subject facilities and of Defendants' goods, services,
5 facilities, privileges, advantages or accommodations within a
6 public accommodation, in violation of California Civil Code
7 §§51, et seq., 52, et seq., and 54, et seq.

8 22. Defendants' actions constitute a violation of
9 Plaintiff's rights under California Civil Code §§51, et seq.,
10 52, et seq., and 54, et seq. and therefore Plaintiff is
11 entitled to injunctive relief remedying all such violations of
12 California access laws and standards. In addition, Plaintiff
13 is entitled to damages under California Civil Code §54.3 for
14 each offense. The amount of damages suffered by Plaintiff is
15 not yet determined. When the amount is ascertained, Plaintiff
16 will ask the Court for leave to amend this complaint to reflect
17 this amount. Plaintiff is also entitled to and requests
18 attorneys' fees and costs.

19 23. The actions of Defendants were and are in violation of
20 the Unruh Civil Rights Act, California Civil Code §§51, et seq.
21 and therefore Plaintiff is entitled to injunctive relief
22 remedying all such violations of California access laws and
23 standards. In addition, Plaintiff is entitled to damages under
24 California Civil Code §52 for each offense. The amount of
25 damages suffered by Plaintiff is not yet determined. When the
26 amount is ascertained, Plaintiff will ask the Court for leave
27 to amend this complaint to reflect this amount.

28 24. Plaintiff seeks all of the relief available to him

1 under Civil Code §§51, 52 et seq., 54, 54.1, 54.2, 54.3, and
2 any other Civil Code Sections which provide relief for the
3 discrimination suffered by Plaintiff, including damages and
4 attorneys fees.

5 VI.

6 THIRD CLAIM FOR
7 VIOLATION OF HEALTH AND
8 SAFETY CODE §19950, ET SEQ.

9 25. Plaintiff re-alleges and incorporates by reference
10 each and every allegation contained in paragraphs 1 through 24,
11 inclusive, as though set forth fully herein.

12 26. Defendants' facilities are public accommodations
13 within the meaning of Health and Safety Code §19950, et seq.,
14 and Plaintiff is informed and believes and thereon alleges that
15 Defendants have newly built or altered the subject property
16 and/or the subject facility since 1971 within the meaning of
17 California Health and Safety Code §19959. The aforementioned
18 acts and omissions of Defendants constitute a denial of equal
19 access to the use and enjoyment of the Defendants' facilities
20 by people with disabilities.

21 27. Defendants' failure to fulfill their duties to provide
22 full and equal access to their facilities by people with
23 disabilities has caused Plaintiff to suffer deprivation of
24 Plaintiff's civil rights, as well as other injuries.

25 28. As a result of Defendants' violations of Health and
26 Safety Code §§19955, et seq., described herein, Plaintiff is
27 entitled to and requests injunctive relief pursuant to Health
28 and Safety Code §§19953, and to reasonable attorney's fees and
costs.

VII.

FOURTH CLAIM FOR DECLARATORY RELIEF

29. Plaintiff re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 28, inclusive, as though set forth fully herein.

30. An actual controversy now exists in that Plaintiff is informed and believes and thereon alleges that Defendants' premises are in violation of the disabled access laws of the State of California including, but not limited to, Civil Code §§51, et seq., §§52, et seq., §§54, et seq., Health and Safety Code §§19950, et seq., Government Code §§4450, et seq. and 7250, et seq., Title 24 of the California Code of Regulations, and/or Title III of the Americans with Disabilities Act and its implementing Accessibility Regulations.

31. A declaratory judgment is necessary and appropriate at this time so that each of the parties may know their respective rights and duties and act accordingly.

VIII.

FIFTH CLAIM FOR INJUNCTIVE RELIEF

32. Plaintiff re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 31, inclusive, as though set forth fully herein.

33. Plaintiff will suffer irreparable harm unless Defendants are ordered to remove architectural barriers at Defendants' public accommodation, and/or to modify their policies and practices regarding accommodating people with disabilities. Plaintiff has no adequate remedy at law to redress the discriminatory conduct of Defendants.

1 34. Plaintiff seeks injunctive relief to redress
2 Plaintiff's injuries.

3 IX.

4 JURY DEMAND

5 35. Pursuant to Rule 38 of the Federal Rules of Civil
6 Procedure, Plaintiffs hereby request a jury trial.

7 WHEREFORE, Plaintiff prays for judgment against the
8 Defendants, TIMBERLINE MOULDING, MARVIN WAIT, SUSAN WAIT and
9 DOES 1 through 10, as follows:

- 10 1. For injunctive relief, compelling Defendants to comply
11 with the Americans with Disabilities Act, the Unruh
12 Civil Rights Act and the Disabled Persons Act. Note:
13 the plaintiff is not invoking section 55 of the
14 California Civil Code and is not seeking injunctive
15 relief under that section;
- 16 2. That the Court declare the respective rights and
17 duties of Plaintiff and Defendants as to the removal
18 of architectural barriers at Defendants' public
19 accommodations;
- 20 3. An order awarding Plaintiff actual, special and/or
21 statutory damages for violation of his civil rights
22 and for restitution including, but not limited to,
23 damages pursuant to the applicable Civil Code Sections
24 including, but not limited to, §§52 and 54.3 for each
25 and every offense of Civil Code §§51 and 54;
- 26 4. An award of compensatory damages according to proof;
- 27 5. An award of up to three times the amount of
28 actual damages pursuant to the Unruh Civil

1 Rights Act and the Disabled Persons Act; and

2 6. An order awarding Plaintiff reasonable attorneys' fees
3 and costs;

4 7. Such other and further relief as the Court deems
5 proper.

6 DATED:

2/22/08

LAW OFFICES OF AMY B. VANDEVELD

7
8 
9 AMY B. VANDEVELD,
Attorney for Plaintiff

JS-44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE SIDE OF THIS FORM.)

I (a) PLAINTIFFS

San Diego

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

TIMBERLINE MOULDING; MARVIN
WAIT, SUSAN WA00 FEB 22 2008 4:18
THROUGH 10, Inclusive,

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
San Diego

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

BY:

DEPUTY

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Amy B. Vandeveld, Esq.
LAW OFFICES OF AMY B. VANDEVELD
1850 Fifth Avenue, Suite 22
San Diego, CA 92101 (619) 231-8883

ATTORNEYS (IF KNOWN)

08 CV 0352 BEN CAB

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

• U.S. Government Plaintiff

XX

Federal Question

(U.S. Government Not a Party)

• U.S. Government Defendant

• 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	• 1 • 1		Incorporated or Principal Place of Business in This State	• 4 • 4	
Citizen of Another State	• 2 • 2		Incorporated and Principal Place of Business in Another State	• 5 • 5	
Citizen or Subject of a Foreign Country	• 3 • 3		Foreign Nation	• 6 • 6	

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

42 U.S.C. Sections 12101-12111, 11281-12184 and 12201 et. seq.

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<ul style="list-style-type: none">• 110 Insurance• 120 Marine• 130 Miller Act• 140 Negotiable Instrument• 150 Recovery of Overpayment & Enforcement of Judgment• 151 Medicare Act• 152 Recovery of Defaulted Student Loans (Excl. Veterans)• 153 Recovery of Overpayment of Veterans Benefits• 160 Stockholders Suits• 190 Other Contract• 195 Contract Product Liability	PERSONAL INJURY	PERSONAL INJURY	610 Agriculture	422 Appeal 28 USC 158	400 State Reappointment
	310 Airplane	• 362 Personal Injury- Medical Malpractice	620 Other Food & Drug	423 Withdrawal 28 USC 157	410 Antitrust
	315 Airplane Product Liability	• 365 Personal Injury - Product Liability	625 Drug Related Seizure of Property 21 USC881	PROPERTY RIGHTS	430 Banks and Banking
	320 Assault, Libel & Slander	• 368 Asbestos Personal Injury- Product Liability	630 Liquor Laws	820 Copyrights	450 Commerce/ICC Rates/etc.
	330 Federal Employers' Liability	PERSONAL PROPERTY	640 RR & Truck	830 Patent	460 Deportation
340 Marine	• 370 Other Fraud	650 Airline Regs	840 Trademark	470 Racketeer Influenced and Corrupt Organizations	
345 Marine Product Liability	• 371 Truth in Lending	660 Occupational Safety/Health	SOCIAL SECURITY	810 Selective Service	
350 Motor Vehicle	• 380 Other Personal Property Damage	690 Other	861 HIA (13958)	850 Securities/Commodities Exchange	
• 355 Motor Vehicle Product Liability	• 385 Property Damage- Product Liability	LABOR	862 Black Lung (923)		
360 Other Personal Injury		710 Fair Labor Standards Act	863 DIWC/DIWW (405(g))	875 Customer Challenge 12 USC	
		720 Labor/Mgmt. Relations	864 SSID Title XVI	891 Agricultural Acts	
		730 Labor/Mgmt. Reporting & Disclosure Act	865 RSI (405(a))	892 Economic Stabilization Act	
		740 Railway Labor Act	FEDERAL TAX SUITS	893 Environmental Matters	
		790 Other Labor Litigation	870 Taxes (U.S. Plaintiff or Defendant)	894 Energy Allocation Act	
		791 Empl. Ret. Inc. Security Act	871 IRS - Third Party 26 USC 7609	895 Freedom of Information Act	
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		900 Appeal of Fee Determination Under Equal Access to Justice	950 Constitutionality of State
• 210 Land Condemnation	441 Voting	510 Motions to Vacate Sentence Habeas Corpus		890 Other Statutory Actions	
• 220 Foreclosure	442 Employment	530 General			
• 230 Rent Lease & Ejectment	443 Housing/Accommodations	535 Death Penalty			
• 240 Tort to Land	444 Welfare	540 Mandamus & Other			
• 245 Tort Product Liability	440 Other Civil Rights	550 Civil Rights			
• 290 All Other Real Property		555 Prisoner Conditions			

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

XX Original Proceeding • 2 Removal from State Court • 3 Remanded from Appellate Court • 4 Reinstated or Reopened • 5 Transferred from another district (specify) • 6 Multidistrict Litigation • 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

• CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$ To be determined at trial

Check YES only if demanded in complaint:

JURY DEMAND: XX YES • NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

SIGNATURE OF ATTORNEY OF RECORD

DATE

147993 \$350 se 2/22/08
ODMA\PCDOCS\WORDPERFECT\22816\ January 24, 2000 (3:10pm)

**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

**# 147993 - SH
* * C O P Y * *
February 22, 2008
16:19:58**

Civ Fil Non-Pris

USAO #: 08CV0352
Judge.: ROGER T BENITEZ
Amount.: \$350.00 CK
Check#: BC3349

Total-> \$350.00

FROM: SAN DIEGO V. TIMBERLINE MOULDI